BEFORE THE MONTANA DEPARTMENT OF LABOR AND INDUSTRY

Jan L. Hodges, Charging Party, vs. **Schellinger Constr. Co., Inc.**, Respondent.	**Human Rights Act Case No. 9909008607** *Final Agency Decision on Remand*

I. Procedure and Preliminary Matters

Charging party Jan L. Hodges filed a complaint with the Department of Labor and Industry on August 7, 1998. She alleged that respondent Schellinger Construction Company, Inc. discriminated against her on the basis of sex (female), race (white), and marital status (living with an employee) when it did not hire her for a roller operator job in 1997 and for a position as a gradesetter on or about March 1, 1998. On March 22, 1999, the department gave notice Hodges' complaint would proceed to a contested case hearing, and appointed Terry Spear as hearing examiner.

Contested case hearing took place in Kalispell, Montana, on June 14 through 16 and 24 and 25, 1999. Hodges was present with her attorneys. Michael A. Viscomi and Vanessa M. Ceravolo. The company was present through Al Schellinger, owner and designated representative, with its attorney, Daniel D. Johns, Crowley, Haughey, Hanson, Toole & Dietrich, P.L.L.P. The hearing examiner excluded witnesses on Hodges' motion. Hodges, Sheila Brooks Matt, Vicky Koch, Randy Armstrong, Al Schellinger, John Altenburg, Gail Parsons, Melanie Drown, Bill Janssen, James Mitchell, and Paula Halbert testified in person. Sheila Brooks Matt, Susan Wortman and Eugene Piedalue testified by telephone. The hearing examiner's exhibit docket accompanied his original decision.

Hodges filed her proposed findings and conclusions and her post-hearing brief on July 6, 1999. The company filed its proposed findings and conclusions and its post-hearing brief on July 20, 1999. On July 27, 1999, Hodges waived her right to file a reply brief. On November 29, 1999, the hearing examiner issued the department's final decision, dismissing Hodges' claim. The department found that Hodges proved the first three elements of the first tier of the three-tier standard of proof articulated in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S. Ct. 1817 (1973) because she was a member of a protected class, she applied for and was qualified for a job opening with

the company, and she was rejected despite her qualifications. The department found that Hodges did not prove the fourth element of the first tier, that, after rejection, the position either remained open with the company seeking applicants from persons with Hodges' qualifications, or that the company hired a person with Hodges' qualifications. The department did not proceed to the second and third tiers of the *McDonnell Douglas* test because Hodges had not established a *prima facie* case under the first tier.

After hearing Hodges' appeal on March 20, 2000 and May 15, 2000, the Montana Human Rights Commission remanded this case for further proceedings. The Commission disagreed with the Hearing Officer's legal conclusions and ruled that Hodges proved the fourth element of the first tier of the *McDonnell Douglas* test because the company offered the positions to individuals no more qualified than Hodges. The Commission directed that the department must apply the second and third tiers of the *McDonnell Douglas* test. Under the second tier, the burden shifts to the company to articulate a legitimate, non-discriminatory reason for rejecting Hodges. If the company does articulate such a reason, Hodges (under the third tier) has an opportunity to prove that the company's non-discriminatory reasons for failing to hire her were a pretext for discrimination.

On remand, the parties did not seek the opportunity to offer further evidence. On July 31, 2000, the company filed the final brief, and the case was ready for decision.

II. Issues

Hodges contends that the company unlawfully discriminated against her because of her sex. The legal issue in this case is whether the company had a legitimate, non-discriminatory and non-pretextual reason for choosing other applicants over Hodges. A full statement of the issues appears in the final prehearing order.

III. Findings of Fact

1. At all pertinent times, charging party Jan L. Hodges was a female and a resident of Flathead County, Montana. Final Prehearing Order, "IV. Facts and Other Matters Admitted," Para. 1, June 11, 1999 (approved by the parties, June 14, 1999).

2. At all pertinent times, respondent Schellinger Construction Company, Inc. (the company) was a Montana corporation engaged in the

construction business in Montana with its principal place of business in Columbia Falls, Flathead County, Montana. At all pertinent times, Al Schellinger has been president and CEO of the company. Final Prehearing Order, "IV. Facts and Other Matters Admitted," Para. 2, June 11, 1999 (approved by the parties, June 14, 1999); testimony of Al Schellinger.

3. Hodges completed junior college in 1970, and worked in a sawmill, attorneys' offices and as a waitress. Her first experience with highway construction was in 1995 when she worked as a flagperson for Poteet Construction, a traffic control subcontractor on highway construction projects. Hodges became a member of Laborers' Local Union No. 1334 in 1995. She registered as an "inexperienced" laborer, and the union dispatched her out of the local hiring hall only as a flagperson. She worked again as a flagperson for Poteet in 1996. Local 1334 maintains her skills and abilities card, the basis for referrals to job openings. Her card, in 1999, still listed flagging as her only experience as a laborer. At all pertinent times, Schellinger maintained a collective bargaining relationship with Laborers' Local Union No. 1334. Exhibits 20, 1018 and 1019; testimony of Hodges and Susan Wortman.

4. Hodges met Randy Armstrong, a supervisor for Poteet Construction, in 1996. They began living together as a couple in July 1996. They continued living together through 1997 and 1998. Testimony of Hodges and Armstrong.

5. Armstrong was a skilled gradesetter with over 20 years experience, recognized and well respected in the highway construction industry. The company hired Armstrong as a gradesetter and project superintendent in early 1997, before hiring Hodges. Testimony of Schellinger.

6. Experienced and capable gradesetters are rare and valuable commodities in the highway construction business. Experienced and capable project superintendents, foremen and lead workers are also valuable commodities in the highway construction business. Schellinger and his management employees wanted to keep Armstrong as an employee of the company. The company offered employment to Hodges knowing her relationship to Armstrong. Testimony of Schellinger.

7. The company hired Hodges as a laborer trainee on April 24, 1997, for Federal A.J. Project STPP 52-2 (24) 33, Creston-South. Final Prehearing Order, "IV. Facts and Other Matters Admitted," Paras. 3, June 11, 1999 (approved by the parties, June 14, 1999); testimony of Hodges.

8. Hodges' trainee position was a required bid item in the company's contract with the Montana Department of Transportation (DOT). The

company classified the trainee as 1-1 General Labor for payroll purposes. The hourly rate of pay was $13.89.[1] The company and DOT signed the "Montana Laborer's Training Program" on September 16, 1996, requiring that the company employ Hodges for at least 500 hours. Final Prehearing Order, "IV. Facts and Other Matters Admitted," Para. 4, June 11, 1999 (approved by the parties, June 14, 1999); Exhibits 9, 12 and 1002.

9. The DOT program specified that Hodges' 500 hours of on-the-job training would aim "at developing full journeypersons in the type of trade or job classification involved," including 40 hours flagperson, 150 hours gradesetter, 200 hours pipe layer, and 110 hours gravel. "Training and upgrading of minorities and women toward journeyperson status is the primary objective of the Supplemental Training Provision." Exhibits 12 and 1002.

10. The Creston-South contract included "Special Provisions -- EEO Affirmative Action Requirements on Federal & Federal-Aid Construction Contracts," providing goals for female participation in each trade on the project. These special provisions required that work hours for females on Creston-South be at least 6.9% of the total hours worked on the project, and the trainee's work hours be included in the calculations. Exhibit 1002; Testimony of Vicky Koch.

11. During Hodges' employment with the company, she did not miss a day of work. She worked hard, did a good job, and was an excellent learner. In her Monthly Training Reports for April through September 1997, the company consistently evaluated Hodges' attitude and ability in each of these crafts as good and mostly excellent. Exhibit 13; testimony of Hodges and Armstrong.

12. Hodges operated a roller on several projects for the company, with her hours of operation through August 1997 totaling 341 hours. The laborer trainee program did not expressly approve roller operation. The company paid Hodges laborer scale wages, not operator scale wages, for her time worked on roller operation. The company paid laborer wages to all of its trainees for hours spent operating rollers. Most of the company's trainees in the past have been women. Exhibits 1 and 1015.

13. Hodges worked at least 313 hours learning and setting grade on-the-job. She also spent hours off the clock on nights and weekends learning grade setting from Armstrong. Armstrong was qualified to teach grade setting to

[1] Under the contract, the company could pay a percentage of Hodges' wages, with the balance paid by the government. The company elected to pay all of Hodges' wages.

Hodges. The grade setting knowledge and experience Hodges gained from Armstrong and from actually setting grade was comprehensive and varied. At the conclusion of her training, Hodges was knowledgeable in the field and capable of setting grade, as she had actually done while working for the company. Armstrong assessed Hodges as a competent gradesetter after her months of training. Exhibit 1; testimony of Hodges and Armstrong.

14. Hodges also worked on a pipe crew, initially at Creston-South, and later at the Whitefish project under the supervision of Bill Janssen. Hodges successfully completed the laborer trainee program, so she received a minimum of 200 hours training as a pipe layer. Exhibits 12 and 1002; testimony of Hodges and Schellinger.

15. In August 1997, Hodges sought to fill an opening for a roller operator, as a regular employee and not as a trainee, at the company's Creston-South project. Hodges had been actually performing the work involved in this position for some time. The company hired a welfare program trainee, Carrie Cameron. The company sent Cameron to the Whitefish project and Paula Halbert, the company's only regular employee roller operator, moved from Whitefish to Creston-South. Testimony of Hodges, Armstrong and Schellinger.

16. Hodges believed the company denied her the roller operator job because she was living with Armstrong. She formed this belief because of a conversation with John Altenburg, the company's main EEO Officer. Altenburg accurately repeated to Hodges what Al Schellinger had said--that he was not comfortable with Hodges working under the direct supervision of Armstrong. Hodges knew that the company had other employees supervising each other who had familial relationships, including Carol and David Jones, Bruce and Brian Nelson, Vic and Sara Crace, Joseph and Robert DePoe, and Al and Kyle Schellinger. Testimony of Hodges, Armstrong, Altenburg and Schellinger.

17. The company wanted a female roller operator on Creston-South who was a member of the International Union of Operating Engineers Local No. 400, to meet their EEO compliance requirements. At the time Hodges was only a member of the Construction & General Laborers' Local No. 1334 Union. She inquired about making installment payments towards the initiation fee with the IUOE, but had no current membership. Cameron was hired, became a member of the operator's union, moved to the Whitefish project as the trainee on that job, and stayed on the job without the company going through the hiring hall. Halbert, a member of the IUOE, came to Creston-South and helped the company meet its EEO compliance

requirements. The company could have written a letter to the union's hiring hall seeking to hire Hodges after she joined the union. Without the letter, Hodges, at the bottom of the eligible-to-work list, would have had no prospect of getting the job through the hiring hall. Had the company done so and successfully hired Hodges, it would still have needed to hire a trainee for the Whitefish job, and needed to assign Halbert work. In essence, the company would have hired one more employee than needed, if Hodges had joined the union and the company had then hired her. Testimony of Schellinger.

18. When the company did not hire Hodges for the roller operator position, she raised allegations of discrimination to the field office of the DOT and Altenburg. Her work on the Creston-South project continued to include operation of the roller. The company did not act against her because of Al Schellinger's discomfort with Armstrong supervising her. Hodges did not pursue a discrimination complaint. Testimony of Hodges, Armstrong, Altenburg and Schellinger.

19. Hodges' employment with the company ended October 25, 1997. The company ended her employment as a seasonal lay-off, the typical manner in which it severed employees from its payroll each year. Final Prehearing Order, "IV. Facts and Other Matters Admitted," Para. 4, June 11, 1999 (approved by the parties, June 14, 1999); testimony of Hodges, Armstrong and Schellinger.

20. After Hodges' seasonal lay off on October 25, 1997, the company did not contest her receipt of unemployment benefits, invited her to the company's 1997 Christmas party and to its CPR course in February 1998. Hodges remained listed on the company's Employee Directory for 1998. Through the winter of 1997/98 and the spring of 1998, Hodges checked in with Altenburg, who was also in charge of Operations, regarding any job opportunities available with the company. Exhibit 22; testimony of Hodges, Armstrong and Altenburg.

21. In February 1998, the company had openings on the pipe crew at the company's Dixon-Ravalli highway project, STPP 6-1(61) 109. Hodges asked Altenburg about applying for these positions. Hodges was qualified for some of these positions on the pipe crew. Instead, these positions went to Hobbie Hunter (a current employee), Vic Crace (a recalled former employee, qualified to work as "lead" for the pipe crew) and at least three Native American laborers (new hires), all male employees. Testimony of Armstrong and Bill Janssen.

22. The Dixon-Ravalli project was on tribal reservation property. It was subject to a Resolution of The Confederated Salish and Kootenai Tribes of The Flathead Nation requiring that tribal member and Native Americans both be given preference in hiring and make up 80% of the laborers, 50% of the skilled operators and 50% of the teamsters on the project. In February 1998, the company was meeting these hiring quotas for laborers. The company could have hired Hodges. If it had, loss of some of the quota workers could have made it more difficult for the company subsequently to bring other current or former employees onto the job. The company did not request a waiver from the tribal hiring office to hire Hodges for one of the pipe crew positions. Exhibits 17, 1007 and 1010; testimony of Armstrong, Schellinger and Sheila Brooks Matt.

23. In March 1998, the company needed a gradesetter at Dixon-Ravalli because Armstrong took on the position of project superintendent, replacing Mike Moens. Armstrong told the company he could not continue as lead gradesetter and adequately function as project superintendent at the same time. Armstrong told Hodges of the opening. Hodges inquired about the position through Altenburg. Altenburg told Al Schellinger of Hodges' inquiry. Armstrong recommended Hodges for the gradesetter position. He told the company she was qualified and noted that she was already familiar with the project. Testimony of Hodges, Armstrong and Altenburg.

24. The company did not offer Hodges the gradesetter position. Because of the importance of the gradesetter job, the company limited its search to workers with actual experience as project gradesetters. While the company sought someone with actual experience as a project gradesetter, Kyle Schellinger temporarily worked, under Armstrong's direct supervision, as a nominal gradesetter on the project. Kyle Schellinger is Al Schellinger's son. Kyle Schellinger learned grade setting under Armstrong's instruction as Hodges did. Kyle Schellinger had less experience than Hodges. Kyle Schellinger worked under Armstrong on the project for a few weeks before leaving on a planned trip to Europe. Testimony of Armstrong and Schellinger.

25. Next, the company hired Ric Fideldy, who had experience working as a project gradesetter. Armstrong considered Fideldy slow, inaccurate and lazy. Armstrong kept close watch on Fideldy, reporting his concerns to the company. After a few weeks, the company let Fideldy go because he did a poor job. Testimony of Armstrong and Fideldy.

26. The company next hired Jim Short as the gradesetter. Short had worked for the company 5-6 years earlier at a project in Libby. The company had fired him from the Libby job for grade setting mistakes. Armstrong did

not trust Short, and kept him working gradesetter helper tasks. After six weeks or less on the Dixon-Ravalli project, Short and the company agreed that Short would move on to another job opportunity. The company had found a more qualified gradesetter, George Hilling. The company hired Hilling in August 1998. He remains an employee of the company today. Testimony of Armstrong and Schellinger.

27. The company could hire gradesetters from either the laborers' or operators' unions. Hodges was an enrolled member of the laborer's union. The union representative would have respected Armstrong's recommendation, having worked with him for many years. Hodges could have added grade setting to her job skills card. Hodges did not add grade setting to her job skills card and still had not done so at the time of hearing. Testimony of Hodges and Wortman.

28. In May 1998, Armstrong gave the company two weeks notice that he was considering quitting. One of the reasons he gave the company for quitting was the cost of maintaining two households while he was on the job and Hodges was at home. At that time, Al Schellinger asked a favor from one of its subcontractors, Alpine Construction Company, at its Dixon-Ravalli project, and got Hodges a flagging job with Alpine. Flagging was and is the one job skill Hodges identified on her job skills card with the union. Testimony of Hodges, Armstrong and Schellinger.

29. The company gained many advantages from its numerous trainee programs with the DOT on its various highway construction projects. First, the company had financial incentives. The company received partial reimbursement by DOT on its trainee wages ($10.00 per hour reimbursement on the Creston-South project). The company had the right, even though it did not exercise it, to pay its trainees' wages as low as 60% of the contract rate for the first half of the training program, 75% for the third quarter and 90% for the last quarter of the training program. The company was also able to use the hours of its female trainees towards its EEO Compliance Reviews by the DOT. All of its regular employee and trainee work hours counted collectively in these reviews. The company obtained this EEO compliance review benefit without agreeing to give any special consideration to female trainees for regular employment at the conclusion of their trainee programs. Finally, the company erroneously used its laborer trainees to operate rollers at laborer wages, instead of at higher operator wages.[2] Exhibit 9; testimony of Schellinger and Koch.

[2] The company is now acting to remedy this illegal wage payment. There is no evidence that the company deliberately violated the law, or that the company knew or should have known of the requirement to pay the trainees the higher rate for roller operator work.

IV. Opinion

Montana law prohibits discrimination in employment because of sex. §49-2-303(1)(a) MCA. This illegal discrimination includes refusal of employment and disparate treatment in compensation or conditions of employment because of sex. ***Id.*** Hodges did not pursue her claims that the company discriminated against her because of her race or her marital status. Hodges effectively abandoned, on the facts and the law, her claim of racial discrimination. On this record, also, the company did not act against Hodges because of her marital status. Thus, discrimination by reason of sex is the only claim for adjudication.

The provisions of the Montana Human Rights Act prohibiting discrimination because of sex follow the provisions of Title VII of the Federal Civil Rights Act of 1964, 42 U.S.C. §2000e ***et seq.*** As a result, Montana has adopted the U. S. Supreme Court's three-tier standard of proof in cases where the employer denies a discriminatory motive. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668(1973). *Crockett v. City of Billings*, 234 Mont. 87; 761 P.2d 813, 816 (1988).

Prima Facie Case--First Tier of *McDonnell Douglas*

The first tier of proof in *McDonnell Douglas* required Hodges to prove the basic four elements of a *prima facie* case (411 U.S. at 802, 93 S.Ct. at 1924):

(i) Membership in a protected class;
(ii) Application and qualification for a job opening with the employer;
(iii) Rejection despite qualifications; and
(iv) After rejection, the position either remained open with the employer seeking applicants from persons of complainant's qualifications or the position was filled with a person of complaintant's qualifications.

Crockett, ***supra***, 761 P.2d at 817-18.

Hodges was a member of a protected class. Although she never did fill out a formal application, her inquiries into the jobs (as a roller operator, as a pipe crew member and as a gradesetter) were sufficient. Despite her lack of experience in the construction trade generally and in these three specific jobs, her successful completion of the trainee program rendered her qualified. Despite her qualifications, the company rejected her informal applications. As

directed by the Commission on remand, Hodges was as qualified for the particular jobs as those individuals the company hired. Hodges established her *prima facie* case.

Legitimate Non-discriminatory Reasons—Second Tier of *McDonnell Douglas*

Hodges' *prima facie* case under *McDonnell Douglas* raised an inference of discrimination at law. The burden then shifted to the company to "articulate some legitimate, nondiscriminatory reason for the employee's rejection." *McDonnell Douglas*, 411 U.S. at 802, 93 S.Ct. at 1824. The company had the burden to show, through competent evidence, only that it had a legitimate nondiscriminatory reason. *Crockett* ***supra***, 761 P.2d at 817. The company must satisfy this second tier of proof under *McDonnell Douglas* for two reasons:

> [It] meet[s] the plaintiff's prima facie case by presenting a legitimate reason for the action and . . . frame[s] the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext.

Texas Dept. of Comm. Affairs v. Burdine, 450 U.S. 248, 255-56, 101 S.Ct. 1089, 1095, 67 L.Ed.2d 207, 217 (1981).

The company only needed to raise a genuine issue of fact by articulating clearly and specifically legitimate reasons for its three rejections of Hodges. *Johnson v. Bozeman School Dist.*, 226 Mont. 134, 734 P.2d 209, 212 (1987). It did so.

For the roller operator position, the company hired a female trainee under another program. The financial benefits of hiring a trainee were real and substantial. The company could not hire Hodges as a trainee; she had not applied to that training program. The company placed the trainee in Whitefish, appropriately, and moved a female roller operator to Creston-South. All three employees—Hodges, the trainee, and the female roller operator—were women. Had the company hired Hodges, it would have hired one more regular employee than it needed. Compared to the new hire—the female trainee—Hodges did not have the same attractive cachet of financial benefits, since as a roller operator she would have worked as a regular employee rather than a trainee. Further, Hodges had to join the operators' union (to which she did not belong) before having actual qualifications. She did not join the union, although she made inquiries about joining. Thus, although she was as qualified, the company did produce evidence of legitimate,

non-discriminatory reasons for hiring a trainee (another female) instead of Hodges.[3]

For the pipe crew positions at Dixon-Ravalli, the company used a number of people. First, it brought in a current employee. Hodges cannot claim she was as qualified as an existing employee was. The company benefited financially from maintaining its experienced and current employees. If it took a new hire when a current employee was available, it lost, because it either laid off the current employee or paid one more employee than it needed.

Second, it hired a former employee. Again, Hodges cannot claim equal qualification with an experienced worker. The uncontroverted testimony established that it took years for a worker, male or female, to develop the experience and familiarity that caused an employer to trust and hire that worker. Hodges' training program vaulted her from total inexperience to "green hand," a major leap. It did not make her the equal of experienced workers.[4]

Although the Commission directed a finding that Hodges was as qualified as the persons hired by the company, that directive did not specifically address each hiring decision. In the instances of bringing in a current employee and hiring a former employee, Hodges clearly was not as qualified as the other workers.[5] With regard to the pipe crew positions, there remained, in accord with the Commission's order, a third kind of company hiring decision for which Hodges did establish equal qualifications.

Third, the company used "quota hires," required to do business on the reservation. Just as female trainees could contribute to EEO goals on government projects, Native American hires on reservation projects met tribal hiring goals. At the time of three new hires of Native Americans (all male) in February 1998, the company was meeting the tribal hiring goals. Thus, Hodges was as qualified (indeed, perhaps more experienced) than those three new employees.

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[3] The company argued, on remand, that Hodges never completed the roller operator training and was not as qualified as the hiree. The decision on remand examines this position as if Hodges proved her qualifications, in accord with the Commission's directions.

[4] Hodges' failure to up-date her job skills card left her at an even greater disadvantage. However, this greater disadvantage was not the fault of the company.

[5] The Commission order referenced other hires, but not these two: "The Hearing Officer found that respondent hired welfare program trainees, men with previous, unsatisfactory work histories with respondent, Native American males in excess of the quota set by resolution of the Confederated Salish and Kootenai Tribes of The Flathead Nation, and respondent's owner's less qualified son." Order of Remand, p. 1 (May 31, 2000).

Even with the company meeting the quota at the time it hired the new workers, the overall quota depended upon the entire job-hours. Every time a Native American worker spent an hour working on Dixon-Ravalli, it put the company one hour closer to meeting the overall quota. Additionally, the hiring preference requirement specified the need for a waiver any time the company decided against a Native American applicant (Exhibit 1007). To hire Hodges over any of the three applicants in February 1998, the company needed to seek and obtain a waiver. Had the company sought and obtained the waiver, on the basis of Hodges' arguably greater experience, the company would have lost the hours she worked as hours worked that could meet the overall tribal quota. Hodges could not provide the company with the opportunity to "bank" hours toward the overall tribal quota for the project, no matter how many Native Americans worked on the project at the time. In addition, the company correctly argued that a waiver was not a pro forma matter. Thus, despite her qualifications, the company did produce evidence of a legitimate, non-discriminatory reason for hiring Native American applicants in February 1998 instead of Hodges.

With regard to the gradesetter position, the company offered two justifications for its hiring choices.[6] First, with regard to the males hired to complete the project, the company presented evidence that Ric Fideldy, Jim Short and George Hilling had actual experience as project gradesetters. This was a legitimate business decision for the company to make. Hodges had less experience than each of these three gradesetters. Second, with regard to Kyle Schellinger, the company proved that it gave a temporary position to this less qualified applicant as opposed to Hodges because Schellinger was the son of the president and CEO of the company. Family preference rather than discrimination against a woman motivated the hire. Al Schellinger put his son to work under Armstrong's close direction for a period of weeks, knowing that Kyle would soon leave to go to Europe. There was no direct comparison of qualifications involved in this decision. Had every one of the gradesetters the company ultimately hired been available when Kyle sought the job, Al Schellinger might still have hired his son for those few weeks. Although Armstrong did not trust Short, and Armstrong encouraged the company to distrust and later terminate Fideldy, both men had more on-the-job qualifications than Hodges. Hilling also had more on-the-job qualifications than Hodges.

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[6] On remand the company took issue with the Commission determination that Hodges was as qualified as the persons the company hired. That challenge remains for review on any subsequent appeals. The department cannot consider it on remand.

Excluding Schellinger's son, Hodges did not establish that she was as qualified as the other gradesetters hired--she had far less experience than each of them. She did establish that Armstrong considered her as good or better than as each of those gradesetters. Although she proved she was qualified for the job, the company produced legitimate non-discriminatory reasons why it selected the other candidates. Choosing a gradesetter with project experience ahead of a gradesetter with an excellent recommendation but no experience as a project gradesetter was a legitimate non-discriminatory business decision.

Pretext—the Third Tier of *McDonnell Douglas*

Once the company produced its legitimate reasons for choosing other candidates over Hodges, she had the burden to prove that the company's reasons were in fact a pretext for discrimination. *McDonnell Douglas* at 802, 93 S.Ct. at 1824; *Martinez v. Yellowstone Co. Welfare Dept.*, 192 Mont. 42, 626 P.2d 242, 246 (1981). To meet this third tier burden, Hodges could present either direct or indirect proof of the pretextual nature of the company's proffered reasons:

> She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.

Burdine, ***supra***, at 256, 101 S.Ct. at 1095. Ultimately, Hodges had the burden to persuade the fact-finder that the company illegally discriminated against her because she was female. *Crockett*, ***op. cit.***, 761 P.2d at 818; *Johnson*, ***op. cit.***, 734 P.2d at 213.

Although Hodges presented evidence of how the company treated her and other female employees, she did not ultimately persuade the fact-finder that the company's proffered reasons for hiring others were pretextual and proffered to disguise a bias against her as a woman. While the willingness to try gradesetters with unsatisfactory past work histories ahead of Hodges raised a close factual question, the company consistently exercised its preference for experience. Unless contract requirements or a chance to save money by hiring a trainee applied, the company chose to hire experienced workers in essentially all instances. The company did have genuine non-discriminatory reasons for the employment choices it made.

Since the treatment of trainees, male or female, in subsequent hiring decisions was, as far as the evidence in this case showed, legitimate, the

company's use of the trainee program through the DOT did not have a disparate impact on women. Although only one of the eight female trainees the company has hired since 1994, Kim Launer, obtained regular employment at the conclusion of her trainee program, there is no proof that males with the same limited experience obtained regular employment at any greater rate.

According to Jim Mitchell, project manager of the DOT, the quality and degree of the training provided to the trainees was solely up to the company. The company can use trainees on an "as needed/per project" basis so long as they do receive the training promised. Hodges did not prove the company failed to provide the training promised. No disparate impact or treatment directed toward either Hodges or women in general appeared in the company's training programs.

Hodges presented evidence that some of the company's female regular employees in the field had endured one form of sexual harassment or another. She presented evidence that one supervisor in particular had a pattern of engaging in harassment. The company responded with evidence that it had acted to discipline that supervisor. The degree of discipline appears little better than a token punishment. This evidence raises a question of employer motive in the harassment area. Nevertheless, standing alone, this evidence did not establish pretext in the company's proffered reasons for not hiring Hodges.

The company had several EEO officers, including Altenburg, but the hearing examiner does question whether the company took EEO matters or complaints seriously. Altenburg admitted that he only spent 5-10% of his job hours handling EEO matters. The company had few, if any, regular meetings with its employees to properly educate them about EEO rights and obligations. The authority given to Altenburg to investigate such complaints and take appropriate action was questionable at best and totally dependent upon Al Schellinger's approval at worst. Nevertheless, this problem area, taken with the slack interest in preventing harassment, still did not establish pretext in the company's proffered reasons for not hiring Hodges.

Finally, the hearing examiner also considered the company's underpayment of wages for trainee hours spent as roller operators. However, not all trainees were women. The company made a mistake, in its own favor. The DOT caught the mistake. The company and the regulatory agency are now rectifying this mistake. Proof of this mistake does not salvage Hodges' discrimination claims. Schellinger Construction did not illegally discriminate against Jan L. Hodges.

V. Conclusions of Law

1. The Department has jurisdiction over this case. §49-2-509(7) MCA.

2. Hodges did not prove that the company discriminated against her in employment because of her sex when it refused to hire her as a roller operator, as a member of the pipe crew and as a gradesetter in 1997-98.

VI. Order

1. Judgment is found in favor of Schellinger Construction Company, Inc. and against Jan L. Hodges on the charges that the company discriminated against Hodges on the basis of sex (female), race (white), and marital status (living with an employee) when it did not hire her for a roller operator job in 1997, and for a position as a gradesetter on or about March 1, 1998.

2. The complaint is dismissed.

Dated: October 16, 2000.

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Terry Spear, Hearing Examiner
Montana Department of Labor and Industry